No. 75-1774

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In the Supreme Court of the United States

OCTOBER TERM, 1975

CIVIC AWARENESS OF AMERICA, LTD., a non-profit Wisconsin Corp., ROSE EMMONS and JOANNE KUFFEL,
Petitioners,

vs.

SECRETARY OF H.E.W., DONALD S. BUZARD, President of Planned Parenthood Association of Milwaukee, PLANNED PARENTHOOD ASSOCIATION OF MILWAUKEE and PLANNED PARENTHOOD-WORLD POPULATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE P. KERSTEN
231 N. Wisconsin Avenue
Milwaukee, Wisconsin 53203

CHARLES B. CANNON
135 S. LaSalle Street
Chicago, Illinois 60603
Attorneys for Petitioners

Of Counsel:
ROMAN H. PAPKA and
KERSTEN & MC KINNON
231 W. Wisconsin Avenue
Milwaukee, Wisconsin 53203

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UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Civic Awareness of America, Ltd., Rose Emmons and Joanne Kuffel respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this action March 9, 1976.

OPINIONS BELOW

The unpublished per curiam order of the Court of Appeals appears in the appendix hereto at page App. 10. The opinions of the District Court, reported at 343 F.Supp. 1358 (1972) and 387 F.Supp. 1086 (1975), appear in the appendix hereto at pages App. 22 and App. 14.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered March 9, 1976. This petition for certiorari was filed within 90 days of that date. This court has jurisdiction under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

The questions presented in this case are:

1. Can Congress force a person, through taxation, to engage in the promotion and practice of a pattern of sexual behavior contrary to that person's religious beliefs?
2. What would the result in *Tilton* v. *Richardson* (1971), 403 U.S. 672, have been if the federal funds had been granted for marriage guidance courses?
3. Do government promotion and proselytizing of a particular, innovative pattern of sexual behavior constitute government activity in the moral and religious sphere?
4. Does plaintiffs' amended complaint seeking declaratory and injunctive relief to prevent grants

under the Social Security Act,[1] and the Family Planning Services and Population Research Act of 1970[2] for abortions, artificial contraception and similar activities on the grounds such expenditures violate the Free Exercise and Establishment clauses of the First Amendment, present substantial constitutional issues so as to justify convening a three-judge court?

5. Do expenditures under the Family Planning Services and Population Research Act of 1970 for abortions constitute a violation of the following provision of that Act:

> "Sec. 1008. None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning."

6. Do plaintiffs have standing, either as taxpayers or under the Administrative Procedure Act, to challenge expenditures under the Family Planning Services and Population Act of 1970 for abortions as a violation of Sec. 1008 of said Act expressly prohibiting such use of funds.

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[1] 42 U.S.C. 708

[2] 42 U.S.C. 300

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case which appear in full text in the appendix hereto, at page App. 1, are Sec. 508(a) of the Social Security Act, 42 U.S.C. Sec. 708; Sec. 1008 of the Family Planning Services and Population Research Act of 1970, Title 42 U.S.C. Sec. 300; and Sec. 10 of the Administrative Procedure Act, 5 U.S.C. Sec. 702. The case also involves the First Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

A. Nature of the case, course of proceedings and disposition below.

This is a taxpayers' suit challenging the constitutionality of provisions of the Social Security Act (Title 42, U.S.C. Sec. 708), and the Family Planning Services and Population Research Act of 1970 (42 U.S.C. Sec. 300 *et seq.*), and expenditures under those acts, as an infringement upon plaintiffs' rights under the First Amendment to the free exercise of religion and against laws respecting an establishment of religion.

The trial court denied plaintiffs' application for a three-judge court on the basis the constitutional questions raised were insubstantial. 343 F.Supp. 1358 (1972). (App. p. App. 22)

The complaint also charges that expenditures were being made for family planning programs involving abortion, notwithstanding a statutory prohibition against such expenditures providing:

> "None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning."[3]

[3] 42 U.S.C. § 300 a-6.

The trial judge, after dismissing the constitutional claims, held that plaintiffs no longer had standing to challenge the statutory authority for the expenditures to support abortion, and the suit was dismissed. 387 F.Supp. 1086 (1975). (App. p. App. 14)

Plaintiffs appealed from the order denying the motion for a three-judge court and from the order and judgment dismissing the action. The Court of Appeals for the Seventh Circuit on March 9, 1976 in an unpublished order affirmed the District Court and adopted the District Court's opinion as its own. (App. p. App. 13)

B. The facts.

Plaintiff Civic Awareness is a non-profit Wisconsin corporation whose members reside in Wisconsin and in various other states, associated for the purpose of upholding the principles of Judeo-Christian civilization and opposing artificial contraception, cloning, vasectomy, abortion and similar activities as corrosive of the morals of youth and laws protecting public morality.

Plaintiffs Rose Emmons and Joanne Kuffel are Wisconsin citizens and federal taxpayers; they are members of a religion which holds that the human life of a person is a gift of the Creator at the time of conception, that he is endowed at that time with the right to life and, during his maturity the right to transmit life; that artificial contraception, cloning, vasectomy, and abortion are morally wrong.

Defendant Secretary of HEW is charged with administering Sec. 508(a) of the Social Security Act which provides for grants to non-profit private agencies for family planning services; the Secretary is also charged with administering the "Family Planning Services and Popula-

tion Research Act of 1970'' which provides, among other things, for the making of grants and entering into contracts with non-profit private agencies for family planning projects.[4] The 1970 act authorizes an appropriation of $30 million for the fiscal year ending June 30, 1971; $60 million for the year ending June 30, 1972; and $90 million for the year ending June 30, 1973. The provisions of the Social Security Act and the Family Planning Services and Population Research Act of 1970 involved in this case are attached as exhibits to the amended complaint and found herein at App. p. App. 9 and App. p. App. 2.

In February 1971, HEW made a grant to defendant Planned Parenthood Association of Milwaukee (now known as Planned Parenthood Association of Wisconsin, Inc.) under Sec. 508(a) of the Social Security Act in the amount of $224,790 for family planning. This defendant is one of 182 affiliates of the defendant Planned Parenthood-World Population and these defendants are hereinafter referred to collectively as the ''defendant Planned Parenthood.'' The purpose of the defendant Planned Parenthood is to obtain federal financing for artificial contraception, sexual sterilization, eradication of all restrictions on fertility control including those based on age and marital status and repeal of all abortion laws.

The defendant Planned Parenthood in the year 1970 was responsible in Milwaukee for 486 vasectomies from May 1 through December 1; 700 vasectomy referrals to doctors in private practice and abortion counseling to more than 500 women July through December, 1970 (Exhibit ''B'' of Plaintiffs' Amended Complaint).

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[4] 42 U.S.C. § 300 (App. p. App. 2).

The complaint also alleges that both the national and local leadership of Planned Parenthood have a long record in favor of federal subsidy and financing of abortion on demand, sterilization, vasectomy and artificial contraception.

Further the defendant Planned Parenthood is charged by the complaint with having conducted massive nationwide propaganda for family planning programs strongly urging artificial contraception, sterilization and abortion, particularly for the poor and for so-called unwanted children to the point where such programs are, in fact, mandatory.

The complaint also charges the grants made by the defendant HEW to the defendant Planned Parenthood organizations are for the fostering of artificial contraception, vasectomy and abortion counseling, despite the provision in the 1970 act excluding abortion.

The plaintiffs charge that the statute itself, and also the grants already made and the threatened continuing grants, aid in the establishment of a religion, to-wit: Secular Humanism; the past and threatened future grants also require plaintiffs to support a religion of human procreation and the use of federally supported genetics and selective population control all of which is contrary to their own and to the moral standards of the people of the United States for the greater part of its history.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT MUST RESOLVE THE IMPORTANT QUESTION WHETHER FEDERAL FINANCING OF ABORTION, ARTIFICIAL CONTRACEPTION, VASECTOMIES, STERILIZATION AND CLONING CONSTITUTES A VIOLATION OF THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT.

A. The public importance of these questions.

This case challenges government financing and promotion of a specific, innovative pattern of sexual behavior, inescapably involving the government in the moral and religious sphere.

That human sexual behavior is an area in which the government simply does not belong was, in effect, the holding of *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). *Griswold* involved the prosecution of a Planned Parenthood director and a doctor under the state law prohibiting use of a drug for contraception. The court struck down the state law because it ". . . operates on an intimate relation of husband and wife . . . in an aspect of that relation." *Id.* at p. 482. The court went on to characterize the field of human sexual conduct as being "sacred." *Id.* at p. 485.

In *Roe* v. *Wade,* 410 U.S. 113 (1973) this court struck down certain anti-abortion laws and seriously circumscribed others. It did so not because abortion is good or because it should be promoted by the government, but rather, precisely because government presence in such

intimate and private matters, even where merely regulative, is repugnant to the First Amendment. It is just as impermissible for the government to be in the "sacred precincts of marital bedrooms" (*Griswold,* p. 485) promoting and participating in one type of activity (such as those challenged in the instant case) as it is for the government to be in these sacred precincts forbidding other types of activity.

It is clear from *Griswold* and *Roe* that the proscriptions against government activity regarding the personal intimacies of the home, family, marriage, motherhood and procreation are not merely due to the privacy to which these matters are constitutionally entitled, but also to the moral consequences essentially involved in these activities. Sex and sexual behavior are by definition sacred and moral matters because they deal with the creation of a human being. The act of creation of a human being is completely beyond the jurisdiction of the United States Congress. Quite literally, it is in the jurisdiction of God, the Creator:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. . . ." *American Declaration of Independence.*

This court has held these words to be the spirit of the Constitution and a formal recognition of the divine source of man and his fundamental rights. *Butchers Union* v. *Cream City,* 111 U.S. 746, 756 (1884).

Government intervention in the sacred precincts of marital bedrooms by promotion of a particular pattern of sexual behavior is especially offensive when the pattern is innovative in character. The traditions embodied in the

Declaration of Independence are reflected in the language of the Supreme Court in *Zorach* v. *Clausan,* 343 U.S. 306, 313 (1952): "We are a religious people whose institutions presuppose a Supreme Being." This was recently reaffirmed by this court in *School Dist. of Abington Twt.* v. *Schempp,* 374 U.S. 203, 213 (1963). The moral and religious values of our civilization respecting sex in human life, are in fact embodied throughout our constitutional, statutory and common law. These include concepts of due process and laws against various forms of indecent behavior. The statutes complained of in this action and expenditures thereunder promote and finance kinds of sexual behavior which traditionally have been considered heinous, much less contrary to the traditions of our civilization and laws. The language of *Lemon* v. *Kurtzman,* 43 U.S. 602, 624 (1971) is therefore particularly apt to the statutes and expenditures complained of herein:

> "Indeed the state programs before us today represent something of an *innovation.* We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that in constitutional adjudications some steps, which when taken were thought to approach 'the verge,' have become a platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop." (Emphasis supplied)

The public importance of this question is enhanced by the flagrant coercion arising from the aggressive proselytizing and promotion of the various "family planning" programs of defendants. Despite defendants' insistence

that both statutes involved in the instant case are careful to insist on "voluntary participation," Exhibit "H-1" to plaintiffs' motion to convene a three-judge court (an article from the January 1972 (Vol. 1, No. 1) issue of *Family Planning Digest* published by the *National Center for Family Planning Services of the Department of H.E.W.*) demonstrates the contrary. This article shows the pressure methods used by H.E.W. "Outreach" personnel to herd poor people into their control for "family planning," and to reach "program drop-outs" or persons who "never showed up" and also to reach female "target" population or teenagers who are just beginning sexual activity. According to the above article, ". . . this is the stage when introduction of family planning information into school curriculum becomes an important concern."

This court in *Engle* v. *Vitale,* 370 U.S. 421 (1962) noted:

> "When the power and prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

The legislation involved in the instant case, as described in paragraph 10 of plaintiffs' complaint, is particularly designed for persons of low income. No one can reasonably argue in the practical world that this legislation is not mandatory and coercive within the meaning of *Engle* v. *Vitale, supra.*

B. What would the result in Tilton v. Richardson, 403 U.S. 672 (1971), have been if the funds involved had been granted for marriage guidance courses?

This court has not heretofore determined whether governmental intervention and promotion of an innovative pattern of sexual conduct contravenes the Free Exercise

and Establishment clauses of the First Amendment. The courts below and defendants herein rely heavily upon *Tilton* v. *Richardson,* 403 U.S. 672 (1971), contending they show the instant plaintiffs' constitutional claims are insubstantial. The *Tilton* decision itself, however, demonstrates the opposite.

In *Tilton* this court considered whether the Higher Education Facilities Act of 1963 contravened the Establishment and Free Exercise clauses of the First Amendment. Upholding the Act, this court concluded the Act did not fall within the criteria or guidelines of impermissible "government activity in this sensitive area of constitutional adjudications." *Tilton,* p. 678. Those criteria include whether the legislation reflects a secular legislative purpose, has as its primary effect the advancement or inhibition of religion, fosters excessive governmental entanglement with religion, or inhibits the free exercise of religion.

If in *Tilton* the federal funds were to be used for marriage guidance courses, no one could reasonably contend the First Amendment would not have been violated. Similarly if Planned Parenthood here wished to conduct seminars in mathematics, city planning or similar matters the instant plaintiffs would not be complaining. Unfortunately the government and Planned Parenthood with government funds want instead to intrude into the most sensitive area of religion and morality, namely, the sacred precincts of sexual conduct. *Griswold, supra,* says the government should not be there and *Tilton* effectively holds the same thing.

This court has not heretofore determined whether government intervention in and promotion of innovative sexual conduct violates the First Amendment Establishment

Clause. The complaint in the instant case formally alleges secular humanism is a religion. See *Torcaso* v. *Watkins,* 367 U.S. 48 (1961) and *Welsh* v. *United States,* 398 U.S. 333 (1970). This is a matter of proof, not before the court on this petition, and Planned Parenthood and the government must accept the existence of this religion as a fact for purposes of this petition.

The defendants attempt to classify the statutes challenged herein as secular statutes which only coincidentally bear upon tenets of one religion or another. The attempt is thus made to identify them with divorce legislation, public support of restaurants which do not serve kosher food, public funds for transportation and public support of desegration. All of the latter, however, are typical examples of laws and traditions which are "deeply imbedded in the fabric of our national life, beginning with the pre-revolutionary colonial times," and within the language of *Walz* v. *Tax Commission,* 397 U.S. 664, 676 (1970):

> "Few concepts are more deeply imbedded in the fabric of our national life, beginning with pre-revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality towards churches and religious exercises generally so long as none was favored over others and none suffered interference.
>
> "It is significant that Congress from its earliest days has viewed the religion clauses of the constitution as authorizing statutory real estate tax exemptions to religious bodies."

In contrast, the statutes and expenditures complained of herein involve *innovative* federal programs, repeatedly described in defendants' own promotional material as requiring active proselytizing and conversion to the pattern

of sexual behavior advanced by Planned Parenthood and similar groups.

In this regard it must also be noted that sexual behavior and specific patterns of sexual behavior are so much a part of moral and religious values that government promotion of a specific, innovative pattern of sexual behavior at least constitutes action *respecting* an establishment of religion. See *Lemon* v. *Kurtzman, supra,* which holds government action may be unconstitutional as *respecting* an establishment of religion, even though such action does not reach the point of establishment of a religion.

This case therefore presents the question, not heretofore decided by this court, whether government intervention in and promotion of innovative sexual conduct such as engaged in by defendants constitutes a violation of the Free Exercise and Establishment clauses of the First Amendment.

Plaintiffs are entitled to a hearing on these issues.

II.

THE HOLDINGS OF THE LOWER COURTS CONCERNING PLAINTIFFS' STANDING TO CHALLENGE THE LEGISLATIVE ENACTMENTS AS FEDERAL TAXPAYERS OR UNDER THE ADMINISTRATIVE PROCEDURE ACT REFUSE TO CONSIDER THE EXTRAORDINARY SENSITIVE, MORAL AND RELIGIOUS ACTIVITIES COMPLAINED OF.

A. Taxpayers' standing.

The courts below concluded plaintiffs did not allege "direct injury" to themselves as required by this court in the *Frothingham* v. *Mellon,* 262 U.S. 477 (1923) and *Flast* v. *Cohen,* 392 U.S. 83 (1968) cases. According to the

District Court the plaintiffs herein raise no more than "generalized grievances" about these federal appropriations under the Social Security Act and the Family Planning Services and Population Research Act of 1970. This holding ignores plaintiffs' complaint which alleges not only grievances relating to financial participation in what are essentially moral and religious activities repugnant to plaintiffs' own moral and religious convictions but also alleges, because of the coercive nature which the federally financed programs have, a direct irreparable damage to the class represented by the plaintiffs.

Frothingham and *Flast* require both a logical link between status as a taxpayer and the challenged legislative enactment, and also a nexus between such status and a specific constitutional limitation imposed on the taxing and spending power. Plaintiffs have shown both. In this case plaintiffs are challenging federal expenditures designed to prevent or destroy life itself. This includes destruction of life through all stages of pregnancy, before or after viability of the fetus, and thus destruction of "persons" within the meaning of the Fifth Amendment to the United States Constitution. This is a specific limitation upon Congress' power. It prevents expenditures for defendants' programs, which are not part of our country's traditions and which, in fact, have traditionally been regarded as heinous. Plaintiffs' claims are not "generalized grievances" about the conduct of the federal government but concern concrete specific and irreparable damage to plaintiffs' class.

B. Standing under the Administrative Procedure Act.

Defendants and the lower courts denied plaintiffs' access to the federal courts under the Administrative Procedure Act on the grounds plaintiffs cannot represent unborn

children as a result of their class. This court in *Data Processing Services* v. *Camp*, 397 U.S. 150 (1970), and *Barlow* v. *Collins*, 397 U.S. 159 (1970) held persons to have standing to seek judicial review of federal agency actions where (1) they allege the challenged action has caused them "injury in fact," and (2) the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies were claimed to have violated. The "interests" may be non-economic as well as economic. *Sierra Club* v. *Morton*, 504 U.S. 727 (1972). Representatives of those injured have standing to sue. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951); *National Assn. for the Advancement of Colored People* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

CONCLUSION

We respectfully submit that at least substantial constitutional questions are raised by the complaint's allegations of massive federal invasion into the sphere of sexual behavior, nationwide federal subsidizing and establishment of a specific, innovative pattern of sexual behavior, large scale federal promotion and proselytizing to achieve converts to that pattern of behavior, all running counter to the beliefs of the plaintiffs and their class who by their taxes are forced to support such activities.

The questions raised are "not plainly insubstantial," *Schneider* v. *Rusk*, 372 U.S. 224, 225 (1963). They are substantial and of largescale, nationwide import. They should be decided by a three-judge court.

Moreover, the plaintiffs' standing to assert their constitutional claims is sufficient to support, as well, their statutory allegations, and they additionally have standing to pursue their statutory claims both as taxpayers and under the Administrative Procedure Act.

Plaintiffs therefore respectfully request that the Court grant certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

GEORGE P. KERSTEN
231 W. Wisconsin Avenue
Milwaukee, Wisconsin 53203

CHARLES B. CANNON
135 S. La Salle Street
Chicago, Illinois 60603
Attorneys for Petitioners

Of Counsel:
ROMAN H. PAPKA and
KERSTEN & MCKINNON
231 W. Wisconsin Avenue
Milwaukee, Wisconsin 53203

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APPENDIX

APPENDIX

Statutory Provisions Involved

Administrative Procedure Act, 5 U.S.C., Sec. 702:

§702. Right of Review.

A person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

Judiciary and Judicial Procedure, 28 U.S.C., Sec. 2281 and 2282:

§2281. Injunction against enforcement of State statute; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. (June 25, 1948, ch. 646, 62 Stat. 968.)

§2282. Injunction against enforcement of Federal statute; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. (June 25, 1948, ch. 646, 62 Stat. 968.)

Family Planning Services and Population Research Act of 1970 (Tydings Act, 42 U.S.C., Sec. 300 *et seq.*):

SUBCHAPTER VIII. — POPULATION RESEARCH AND VOLUNTARY FAMILY PLANNING PROGRAMS

§300. Project grants and contracts for family planning services.

(a) Authority of Secretary.

The Secretary is authorized to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects.

(b) Factors determining.

In making grants and contracts under this section the Secretary shall take into account the number of patients to be served, the extent to which family planning services are needed locally, the relative need of the applicant, and its capacity to make rapid and effective use of such assistance.

(c) Authorization of appropriations.

For the purpose of making grants and contracts under this section, there are authorized to be appropriated $30,000,000 for the fiscal year ending June 30, 1971; $60,000,000 for the fiscal year ending June 30, 1972; and $90,000,000 for the fiscal year ending June 30, 1973 (July 1, 1944, ch. 373 title X, §1001, as added Dec. 24, 1970, Pub. L. 91-572, §6(c), 84 Stat. 1506.)

Short Title

Section 1 of Pub. L. 91-572 provided that: "This Act (which enacted this subchapter and sections 3505a to 3505c of this title, and amended provisions set out as notes under section 201 of this title) may be cited as the "Family Planning Services and Population Research Act of 1970'."

Congressional Declaration of Purpose

Section 2 of Pub. L. 91-572 provided that:

"It is the purpose of this act (see Short Title note set out hereunder)—

"(1) to assist in making comprehensive voluntary family planning services reading available to all persons desiring such services;

"(2) to coordinate domestic population and family planning research with the present and future needs of family planning programs;

"(3) to improve administrative and operational supervision of domestic family planning services and of population research programs related to such services;

"(4) to enable public and nonprofit private entities to plan and develop comprehensive programs of family planning services;

"(5) to develop and make readily available information (including educational materials) on family planning and population growth to all persons desiring such information;

"(6) to evaluate and improve the effectiveness of family planning service programs and of population research;

"(7) to assist in providing trained manpower needed to effectively carry out programs of population research and family planning services; and

"(8) to establish an Office of Population Affairs in the Department of Health, Education, and Welfare as a primary focus within the Federal Government on matters pertaining to population research and family planning, through which the Secretary of Health, Education, and Welfare (hereafter in this Act referred to as the 'Secretary') shall carry out the purposes of this Act."

Section Referred to in Other Sections

This section is referred to in sections 300a-300a-4 of this title.

§300a. Formula grants to States for family planning services.

(a) Authority of Secretary; prerequisites.

The Secretary is authorized to make grants, from allotments made under subsection (b) of this section, to State Health authorities to assist in planning, establishing, maintaining, coordinating, and evaluating family planning services. No grant may be made to a State health authority under this section unless such authority has submitted, and had approved by the Secretary, a State plan for a coordinated and comprehensive program of family planning services.

(b) Factors determining amount of State allotments.

The sums appropriated to carry out the provisions of this section shall be allotted to the States by the Secretary on the basis of the population and the financial need of the respective States.

(c) Definitions.

For the purposes of this section, the term "State" includes the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the District of Columbia, and the Trust Territory of the Pacific Islands.

(d) Authorization of appropriations.

For the purpose of making grants under this section, there are authorized to be appropriated $10,000,000 for the fiscal year ending June 30, 1971; $15,000,000 for the fiscal year ending June 30, 1972; and $20,000,000 for the fiscal

year ending June 30, 1973. (July 1, 1944, ch. 373, title X, §1002, as added Dec. 24, 1970, Pub. L. 91-572, §6(c), 84 Stat. 1506.)

Section Referred to in Other Sections

This section is referred to in sections 300a-1, 300a-4 of this title.

§300a-1. Training grants and contracts; authorization of appropriations.

(a) The Secretary is authorized to make grants to public or nonprofit private entities and to enter into contract with public or private entities and individuals to provide the training for personnel to carry out family planning service programs described in section 300 or 300a of this title.

(b) For the purpose of making payments pursuant to grants and contracts under this section, there are authorized to be appropriated $2,000,000 for the fiscal year ending June 30, 1971; $3,000,000 for the fiscal year ending June 30, 1972; and $4,000,000 for the fiscal year ending June 30, 1973. (July 1, 1944, ch. 373, title X, §1003, as added Dec. 24, 1970, Pub. L. 91-572, §6(c), 84 Stat. 1507.)

§300a-2. Research grants and contracts; authorization of appropriations.

(a) In order to promote research in the biomedical, contraceptive development, behavioral, and program implementation fields related to family planning and population, the Secretary is authorized to make grants to public or nonprofit private entities and to enter into contracts with public or private entities and individuals for projects for research and research training in such fields.

(b) For the purpose of making payments pursuant to grants and contracts under this section, there are authorized to be appropriated $30,000,000 for the fiscal year end-

ing June 30, 1971; $50,000,000 for the fiscal year ending June 30, 1972; and $65,000,000 for the fiscal year ending June 30, 1973. (July 1, 1944, ch. 373, title X, §1004, as added Dec. 24, 1970, Pub. L. 91-572, §6(c), 84 Stat. 1507.)

§300a-3. Informational and educational materials development grants and contracts; authorization of appropriations.

(a) The Secretary is authorized to make grants to public or nonprofit private entities and to enter into contracts with public or private entities and individuals to assist in developing and making available family planning and population growth information (including educational materials) to all persons desiring such information (or materials).

(b) For the purpose of making payments pursuant to grants and contracts under this section, there are authorized to be appropriated $750,000 for the fiscal year ending June 30, 1971; $1,000,000 for the fiscal year ending June 30, 1972; and $1,250,000 for the fiscal year ending June 30, 1973. (July 1, 1944, ch. 373, title X, §1005, as added Dec. 24, 1970, Pub. L. 91-572, §6(c), 84 Stat. 1507.)

§300a-4. Grants and contracts.

(a) Regulations governing execution.

Grants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate.

(b) Payment of grants.

Grants under this subchapter shall be payable in such installments and subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made.

(c) Prerequisites.

A grant may be made or contract entered into under section 300 or 300a of this title for a family planning service project or program only upon assurances satisfactory to the Secretary that—

(1) priority will be given in such project or program to the furnishing of such services to persons from low-income families; and

(2) no charge will be made in such project or program for services provided to any person from a low-income family except to the extent that payment will be made by a third party (including a government agency) which is authorized or is under legal obligation to pay such charge.

For purposes of this subsection, the term "low-income family" shall be defined by the Secretary in accordance with such criteria as he may prescribe. (July 1, 1944, ch. 373, title X, §1006, as added Dec. 24, 1970, Pub. L. 91-572, §6(c) 84 Stat. 1507.)

§300a-5. Voluntary participation by individuals; participation not prerequisite for eligibility or receipt of other services and information.

The acceptance by any individual of family planning services or family planning or population growth information (including educational materials) provided through financial assistance under this subchapter (whether by grant or contract) shall be voluntary and shall not be a prerequisite to eligibility for or receipt of any other service or assistance from, or to participation in, any other program of the entity or individual that provided such service or information. (July 1, 1944, ch. 373, title X, §1007, as added Dec. 24, 1970, Pub. L. 91-572, §6(c), 84 Stat. 1508.)

§300a-6. Prohibition against funding programs using abortion as family planning method.

None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning. (July 1, 1944, ch. 373, title X, §1008, as added Dec. 24, 1970, Pub. L. 91-572, §6(c), 84 Stat. 1508.)

Social Security Act of 1935, 42 U.S.C., Sec. 708:

§708. Special project grants for maternity and infant care.

(a) In order to help reduce the incidence of mental retardation and other handicapping conditions caused by complications, associated with childbearing and to help reduce infant and maternal mortality, the Secretary is authorized to make, from the sums available under clause (B) of paragraph (1) of section 702 of this title, grants to the State health agency of any State and, with the consent of such agency, to the health agency of any political subdivision of the State, and to any other public or nonprofit private agency, institution, or organization, to pay not to exceed 75 percent of the cost (exclusive of general agency overhead) of any project for the provision of—

(1) necessary health care to prospective mothers (including, after childbirth, health care to mothers and their infants) who have or are likely to have conditions associated with childbearing or are in circumstances which increase the hazards to the health of the mothers or their infants (including those which may cause physical or mental defects in the infants), or

(2) necessary health care to infants during their first year of life who have any condition or are in circumstances which increase the hazards to their health, or

(3) family planning services,

but only if the State or local agency determines that the recipient will not otherwise receive such necessary health

care or services because he is from a low-income family or for other reasons beyond his control. Acceptance of family planning services provided under a project under this section (and section 712 of this title) shall be voluntary on the part of the individual to whom such services are offered and shall not be a prerequisite to the eligibility for or the receipt of any service under such project.

(b) No grant may be made under this section for any project for any period after June 30, 1972. (Aug. 14, 1935, ch. 531, title V, §508, as added Jan. 2, 1968, Pub. L. 90-248, title III, §301, 81 Stat. 926.)

Prior Provisions

Provisions similar to those comprising this section were contained in section 531 of act Aug. 14, 1935, ch. 531, title V, as added Oct. 24, 1963, Pub. L. 88-156, §4, 77 Stat. 274 (formerly classified to section 729 of this title), prior to the general amendment and renumbering of title V of act Aug. 14, 1935, by Pub. L. 90-248, §301.

Section Referred to the Other Sections

This section is referred to in sections 702, 105, 706 of this title.

Opinions Below

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604
Argued December 12, 1975
March 9, 1976

Before
Hon. Walter J. Cummings, Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Joseph Sam Perry, Senior District Judge*

Civic Awareness of America, Ltd., et al.,
Plaintiffs-Appellants,
No. 75-1351

vs.

Secretary of Health, Education and Welfare, et al.,
Defendants-Appellees.

On appeal from order denying motion to convene a three-judge court and from order dismissing action in United States District Court for the Eastern District of Wisconsin.

No. 71 C 344

John W. Reynolds, Judge.

ORDER

The individual plaintiffs are Wisconsin residents and citizens and taxpayers of the United States. The other plaintiff is a non-profit Wisconsin corporation opposing abortion. The defendants are the Secretary of the Department of Health, Education and Welfare ("HEW"),

* Senior District Judge Joseph Sam Perry of the Northern District of Illinois is sitting by designation.

Planned Parenthood Association of Milwaukee, Wisconsin, its president Donald S. Buzard, and Planned Parenthood-World Population, the parent national organization with its headquarters in New York City.

In their amended complaint, plaintiffs allege that the Secretary of HEW granted the Milwaukee association $224,790 in February 1971 for "family planning" under Section 508(a)(3) of the Social Security Act (42 U.S.C. §708(a)(3). Plaintiffs also allege that he planned to grant defendants substantial funds from appropriations under the Family Planning Services and Population Research Act of 1970 (42 U.S.C. §300 *et seq.*) for abortion counseling. Plaintiffs challenge the Secretary's actions on two grounds. They allege that the statute violates the free exercise and establishment clauses of the First Amendment. Alternatively, they contend that the grants made by the Secretary violated a provision of the 1970 statute with respect to abortion.[1]

Pursuant to the constitutional claim, plaintiffs sought injunctive relief and moved to convene a three-judge court. In its first opinion, the district court refused to convene a three-judge court pursuant to 28 U.S.C. §2282 on the ground that the constitutional challenge was insubstantial. 343 F. Supp. 1358. With regard to the statutory claim, plaintiffs sought a declaratory judgment construing the federal statutes in question so that grants could not be made under them for "purposes of artificial contraception, vasectomy or abortion * * *." In its second opinion (387 F.Supp.

[1] 42 U.S.C. § 300a-6 provides:
"None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."

1086), the curt held that the statutory complaint should be dismissed because plaintiffs lacked standing to bring the action as taxpayers or under Section 10 of the Administrative Procedure Act (5 U.S.C. §702).

In its opinion on the constitutional question, the district court carefully analyzed plaintiffs' claims that the payments to Planned Parenthood established a religion labeled "secular humanism," and that the availability of counseling on certain methods of family planning restrained plaintiffs' free exercise of their religious beliefs. We agree with the district court's reasoning and adopt its opinion as our own. See *Meek* v. *Pittenger*, 422 U.S. 349, 358-359.

We also agree with the district court that the statutory action should be dismissed for want of plaintiffs' standing and again adopt its opinion as our own. See also *Reich* v. *City of Freeport*, ...F.2d ....., ... (7th Cir. No. 75-1027, decided December 24, 1975, slip op. 4-6); *Korioth* v. *Briscoe*, 523 F.2d 1271 (5th Cir. 1975).

Judgment affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

March 9, 1976
Before
Hon. Walter J. Cummings, Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Joseph Sam Perry, Senior District Judge*

Civic Awareness of America, Ltd., et al.,
Plaintiffs-Appellants,
No. 75-1351
vs.
Secretary of Health, Education and Welfare, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 71 C 344

John W. Reynolds, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

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* Senior District Judge Joseph Sam Perry of the Northern District of Illinois is sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CIVIC AWARENESS OF AMERICA LTD., a non-profit Wisconsin corporation, ROSE EMMONS and JOANNE KUFFEL,

Plaintiffs,

v.

ELLIOT L. RICHARDSON, Secretary of the Department of Health, Education and Welfare, DONALD S. BUZARD, President of Planned Parenthood Association of Milwaukee, PLANNED PARENTHOOD ASSOCIATION OF MILWAUKEE, a Wisconsin corporation, and PLANNED PARENTHOOD-WORLD POPULATION, a foreign corporation,

Defendants.

DECISION AND ORDER
Civil Action No. 71-C-344
(February 3, 1975)

This case involves a challenge to the use of federal funds for family planning and birth control. Plaintiffs are a non-profit corporation and individuals who oppose certain forms of population control. They seek to prevent further grants by defendant Elliot L. Richardson to defendants Planned Parenthood Association of Milwaukee and Planned Parenthood-World Population (hereinafter "Planned Parenthood") under § 508(a)(3) of the Social Security Act, 42 U.S.C. § 708(a)(3), and future grants under the Family Planning Services and Population Research Act of 1970, 42 U.S.C. § 300.

This court previously denied the plaintiffs' motion to convene a three-judge district court, 348 F.Supp. 1358 (1972), on the grounds that the constitutional claims raised

were insubstantial, frivolous, and without merit. Defendant Planned Parenthood has now moved to dismiss the remaining statutory claims. Defendant Richardson has filed an answer accompanied by an affidavit and has moved for judgment on the pleadings or, in the alternative, for summary judgment. The defendants contend that the plaintiffs lack standing to sue and that, as a matter of law, the allocations to Planned Parenthood do not violate the statutes in question. It is unnecessary to reach their second contention, for I find that the plaintiffs lack standing to bring this action both as taxpayers and under the Administrative Procedure Act.

TAXPAYER STANDING

Prior to 1968, the leading Supreme Court case on the standing of taxpayers to challenge federal expenditures was *Frothingham* v. *Mellon,* 262 U.S. 447 (1923). The plaintiff in that case challenged federal funding under the Maternity Act of 1921 for state programs aimed "to reduce maternal and infant mortality and protect the health of mothers and infants." *Id.,* at 479. She alleged that the congressional enactment usurped power reserved to the states under the Tenth Amendment. Thus, she claimed, its effect would be to take her property under the guise of increased future taxes without due process of law.

The Court denied standing, noting that a federal taxpayer's "interest in the moneys of the Treasury" is "comparatively minute and indeterminable," and that "the effect upon future taxation, of any payment out of the [Treasury's] funds," * * * is "remote, fluctuating and uncertain." *Id.,* at 487. As a result, the Court ruled that the taxpayer had failed to allege the type of "direct injury" necessary to confer standing, stating at 488:

> "* * * The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. * * *"

In *Flast* v. *Cohen,* 392 U.S. 83 (1968), the Court reexamined the limitations on federal taxpayer standing. There the taxpayer-plaintiffs alleged that the First Amendment's Establishment Clause was violated by the appropriation of federal funds under the Elementary and Secondary Education Act of 1965 to assist religious schools. The Court summarized the issue of standing as follows at 99:

> "* * * The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker* v. *Carr,* 369 U.S. 186, 204 (1962). * * *"

The Court distinguished *Frothingham* and ruled that there is no absolute constitutional bar to taxpayer suits. It then proceeded to erect a two-tier standing test for federal taxpayers who challenge the constitutionality of a federal spending program. The plaintiff-taxpayer must show (1) a "logical link" between his status as taxpayer and the challenged legislative enactment, in this case under the taxing and spending clause of Article I, Section 8, of the Constitution; and (2) a "nexus" between his status and

a specific constitutional limitation imposed on the taxing and spending power, such as the Establishment Clause. Id., at 102-103.

The vitality of the *Frothingham* limitation on federal taxpayer suits as well as the narrowness of the *Flast* test for taxpayer standing are made evident by the Court's recent decision in *United States* v. *Richardson,* ..... U.S. ....., 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974). The Court ruled that the plaintiff-taxpayer Richardson lacked standing since he fell short of the *Flast* criteria and within the *Frothingham* holding. The Court reaffirmed the principle of *Frothingham* precluding a taxpayer's use of "a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast* v. *Cohen,* supra, at 106. See also *Schlesinger* v. *Reservists' Committee to Stop the War,* ..... U.S. ....., 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974).

These decisions make it apparent that the individual and corporate plaintiffs lack standing to maintain this action as taxpayers.[1] This court's earlier ruling determined that the plaintiffs' challenge to the instant expenditures under the Establishment Clause was insubstantial, frivolous, and without merit. The previous ruling prevents further reliance by the individual plaintiffs upon *Flast* for taxpayer

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[1] Plaintiffs' assertion of the continued justiciability of the statutory questions has no bearing on the initial issue of the plaintiffs' standing to raise these matters. Standing to sue is an element of the constitution's "cause or controversy" requirement, and in public actions such as this one, it is necessary to first inquire whether the party seeking relief is a proper party to raise the issues and litigate them before the court.

standing.[2] Their statutory allegations must be tested under the *Frothingham* "direct injury" rule. So measured, the plaintiff-taxpayers raise no more than "generalized grievances" about these federal appropriations; indeed, their allegations bear a strong resemblance to those found deficient in *Frothingham*. The impact on them, like on the plaintiff in *Richardson*, is undifferentiated and common to all members of the public. Hence, they lack a personal stake in the outcome which is necessary to confer standing.

The corporate plaintiff is likewise without standing to sue as a taxpayer. Organizations whose members are injured have been allowed to put forward these persons' constitutional rights in a proceeding for judicial review. *N.A.A.C.P.* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 458-460 (1958); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 121, 149-154 (1951) (Frankfurter, J., concurring). We may assume arguendo that Civil Awareness of America Ltd., though not itself a taxpayer, may assert the constitutional rights of its member-taxpayers. See *Schlesinger*, supra. Applying the *Flast* holding, the corporate plaintiff, like its individual co-plaintiffs, fails to satisfy the nexus test and, hence, lacks standing to sue as a taxpayer.

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[2] Plaintiffs' *a fortiori* argument that they continue to have taxpayer standing to challenge a federal expenditure designed to prevent or destroy life is without merit. As a general rule, litigants may rely on constitutional rights which are personal to themselves and may not, save in exceptional cases, assert the rights of absent third parties, such as an unborn fetus. *Tileston* v. *Ullman*, 318 U.S. 44 (1943).

ADMINISTRATIVE PROCEDURE ACT STANDING

Plaintiffs next contend that they have standing under § 10 of the Administrative Procedure Act (hereinafter "A.P.A."), 5 U.S.C. § 702, which provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

In *Data Processing Services* v. *Camp*, 397 U.S. 150 (1970), and *Barlow* v. *Collins*, 397 U.S. 159 (1970), the plaintiffs were held to have standing under this statute to secure judicial review of federal agency action where (1) they had alleged that the challenged action had caused them "injury in fact," and (2) the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies were claimed to have violated. The Supreme Court's subsequent interpretation of "injury in fact" in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), indicates that persons suffering a noneconomic injury shared by many others can properly seek judicial review of an agency's action, but only if they themselves are among the injured. See also *United States* v. *SCRAP*, 412 U.S. 669 (1973).

In the present case, the plaintiffs claim to represent "some of the unborn children, as part of their class. They assert that these unborn will not be born as a result of the instant federal expenditures, and that this fact satisfies both requirements for the plaintiffs to have standing under A.P.A. § 10 to press their statutory claims. Denominating their suit a class action will not suffice in this instance, for plaintiffs "cannot represent a class of [which] they are not a part," namely, the unborn. *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962); *Hall* v. *Beals*, 396 U.S. 45, 48-49 (1969). "* * * [N]amed plaintiffs without the right

to further represent themselves can[not] continue to represent unnamed parties allegedly in a similar situation." *Watkins* v. *Chicago Housing Authority,* 406 F.2d 1234, 1236 (7th Cir. 1969). Even assuming a proper class action here, plaintiffs' allegations fail to satisfy the A.P.A. test for standing. Nowhere is it shown that the unborn have an interest "protected or regulated" by the Social Security Act or the Family Planning Services and Population Act of 1970.

Plaintiffs further allege that they, who do not use family planning services, have standing under A.P.A. § 10 to challenge these federal expenditures due to the reduced availability of medical facilities and personnel which would result from providing family planning services to others.[3] Assuming that this is a harm, it is not such a direct and specific harm sufficient to supply standing, for the Supreme Court has stated that:

> "* * * A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial. * * *" *SCRAP,* supra, at 688-689.

The plaintiffs have failed to show that the interest they seek to protect is within the interests to be protected by the family planning statutes in question.

In both the *Sierra Club* and *SCRAP* opinions, the Supreme Court stated that the A.P.A.'s standing provisions

[3] The plaintiffs also assert that they are injured by the coercive impact of family planning programs on potential users of these services. This contention is without merit, for I noted in the initial order in this case that "Both statutes are careful to insist on voluntary participation." 343 F.Supp. at 1361.

should not be construed "to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process." *Sierra Club,* supra, at 740; *SCRAP,* supra, at 687. Since the plaintiffs fall into this "concerned bystander" category and have failed to establish their standing to litigate these statutory claims, the respective defendants' motion to dismiss and motion for judgment on the pleadings must be granted.

For the above reasons and for the reasons set forth in this Court's earlier decision in this action at 348 F.Supp. 1358 (1972).

IT IS ORDERED that this action be and it hereby is dismissed on its merits.

Dated at Milwaukee, Wisconsin, this 3rd day of February, 1975.

/s/ John W. Reynolds
U.S. District Judge

JUDGMENT
(Filed February 18, 1975)

This action came on for (hearing) on defendants' motion to dismiss before the Court, Honorable John W. Reynolds, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered, and the court having granted defendants' motion to dismiss.

It is Ordered and Adjudged that the action be dismissed on the merits.

Dated at Milwaukee, Wisconsin, this 18th day of February, 1975.

/s/ Ruth W. LaFave
Clerk of Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CIVIC AWARENESS OF AMERICA LTD., a non-profit Wisconsin corporation, ROSE EMMONS and JOANNE KUFFEL,

Plaintiffs,

v.

ELLIOTT L. RICHARDSON, Secretary of the Department of Health, Education and Welfare, DONALD S. BUZARD, President of Planned Parenthood Association of Milwaukee, PLANNED PARENTHOOD ASSOCIATION OF MILWAUKEE, a Wisconsin corporation, and PLANNED PARENTHOOD-WORLD POPULATION, a foreign corporation,

Defendants.

DECISION AND ORDER

Civil Action No. 71-C-344
(July 24, 1972)

This is a suit to curtail the use of federal funds for family planning and birth control. Plaintiffs are a non-profit corporation and individuals who oppose artificial contraception, cloning, vasectomy, and abortion. Defendants Planned Parenthood Association of Milwaukee and Planned Parenthood - World Population (hereinafter "Planned Parenthood") are corporations engaged in family planning and birth control. Their activities include,

among other things, providing on a volunteer basis vasectomies and abortion counselling. Pursuant to § 508(a)(3) of the Social Security Act, funds have been granted to Planned Parenthood by defendant Elliot L. Richardson. The complaint also alleges that in the future the Department of Health, Education and Welfare may grant funds to Planned Parenthood pursuant to the Family Planning Services and Population Research Act of 1970.

Plaintiffs seek declaration and interlocutory injunctive relief in order to prevent grants of federal funds for artificial contraception, vasectomies, and abortions on the grounds that such funding is without statutory authority and in any case contravenes the Constitution. Federal question jurisdiction is asserted. Because of the complaint challenges federal statutes as being unconstitutional and seeks injunctive relief, the plaintiffs have moved to convene a three-judge district court pursuant to Title 28 U.S.C. §2282. Defendants oppose this motion on the ground that the constitutional challenge is insubstantial. The matter having been briefed and argued before me, I find for the defendants.

Section 508(a) of the Social Security Act (Title 42 U.S.C. § 708) provides in part as follows:

> "(a) In order to help reduce the incidence of mental retardation and other handicapping conditions caused by complications associated with childbearing and to help reduce infant and maternal mortality, * * * (funds may be granted for)
>
> * * *

"(3) family planning services,

* * *. Acceptance of family planning services provided under a project under this section * * * shall be voluntary on the part of the individual to whom such services are offered and shall not be a prerequisite to the eligibility for or the receipt of any service under such project."

The Family Planning Services and Population Research Act of 1970 (Pub.L. 91-572) (Title 42 U.S.C. § 300) reads in part as follows:

"Sec. 2 It is the purpose of this Act—

"(1) to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services;

* * *

"Sec. 1001(a) The Secretary is authorized to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects.

* * *

"Sec. 1007 The acceptance by any individual of family planning services * * * shall be voluntary * * *."

Plaintiffs contend that grants to Planned Parenthood under these statutes violate the First Amendment's prohibition that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *." In light of prior decisions of the Supreme Court this contention is insubstantial and without merit.

Plaintiffs do not contend that Planned Parenthood themselves are private religious organizations, teach religion, or even that they are controlled by such a body. Thus, this case differs from those involving grants to parochial schools and students, see, e.g. *Lemon* v. *Kurtzman,* 403

U.S. 602 (1971), or grants to secular institutions operated by religious groups, see, e.g., *Bradfield* v. *Roberts,* 175 U.S. 291 (1899) (hospital run by Roman Catholics). Rather, plaintiffs characterize birth control as a tenet of a religion, which by their complaint they allege to exist, called "secular humanism," and from this they argue that government support of birth control is constitutionally inseparable from government support of the religion "secular humanism." The establishment clause "does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation—so too with the questions of adultery and polygamy. *Davis* v. *Beason,* 133 U.S. 333; *Reynolds* v. *United States, supra* (98 U.S. 145). The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue." *McGowan* v. *Maryland,* 366 U.S. 420, 442 (1961). In *McGowan* the court sustained Sunday "blue" laws against an attack based on the establishment clause even though "blue" laws aid certain religions in maintaining their Sabbath and, in fact, were historically enacted for this purpose because the modern basis for these laws is a secular one and the aid to any religion is incidental.

In the case before me plaintiffs do not suggest that Congress enacted the challenged statutes for any other reasons than those contained upon the face of the statutes:

"In order to help reduce the incidence of mental retardation and other handicapping conditions caused by complications associated with childbearing and to

help reduce infant and maternal mortality * * *." § 508(a) Social Security Act (Title 42 U.S.C. § 708 (a)).

"to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services; * * *" § 2 Family Planning Services and Population Research Act of 1970 (Title 42 U.S.C. § 300).

There is nothing before me to suggest otherwise. See *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971). Instead plaintiffs take the position that the purpose of promoting family planning or indeed promoting any "pattern of sexual behavior" is per se religious.

It is of course true that some activities are so steeped in religion and limited to religious use that except in unusual circumstances to promote them is per se to promote religion. In *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), for instance, Bible reading in public schools at the beginning of each school day was found to contravene the establishment clause. However, sexual behavior or family planning, while clearly possessing religious significance in the minds of some citizens, just as clearly do not find their origins, as does the Bible, in religion; are not so steeped with religious implications as to be virtually inseparable from religion, as is the Bible; and finally are not, as is the Bible, limited almost solely to religious use. *Davis* v. *Beason*, supra, and *Reynolds* v. *United States*, supra, finding that adultery and polygamy may be forbidden, stand as clear Supreme Court authority to the effect that legislation in the area of sexual activities is not per se establishment of religion. I find the argument that *Abington* as opposed to *McGowan* controls the case before me to be clearly insubstantial and frivolous.

Turning next to plaintiffs' contention that their exercise of religion is impaired, I find that this position, too, is without merit. Both statutes are careful to insist on voluntary participation. Thus, there is no threat that plaintiffs will be compelled to learn about or exercise birth control. Nor can they be heard to complain of religious restraint because part of their taxes go to fund Planned Parenthood. *Tilton* v. *Richardson*, 403 U.S. 672, 689 (1971).

In light of my conclusion that plaintiffs' constitutional challenge is insubstantial and frivolous, it is clear, even assuming that the other requirements of Title 28 U.S.C. § 2282 are met, that plaintiffs' motion to convene a three-judge court must be denied. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713 (1962). However, in that this action challenges government grants to Planned Parenthood upon statutory as well as constitutional grounds, my decision today disposes of only a cause of action and not the entire case before me.

IT IS THEREFORE ORDERED that plaintiffs' motion to convene a three-judge court be and it hereby is denied.

IT IS FURTHER ORDERED that defendants shall file a brief in support of their previously filed motion to dismiss no later than twenty-one days from the date of entry of this order. Plaintiffs may file a responding brief no later than forty-two days from the date of the entry of this order. Defendants shall have forty-nine days from the date of the entry of this order to respond. Unless otherwise ordered, the motion to dismiss will be decided upon the briefs filed without oral argument.

Dated at Milwaukee, Wisconsin, this 24th day of July 1972.

/s/ *John W. Reynolds*
U.S. District Judge

Supreme Court, U. S.
FILED
JUL 2 1976

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-1774

CIVIC AWARENESS OF AMERICA, LTD., a non-profit Wisconsin corp., ROSE EMMONS and JOANNE KUFFEL,

Petitioners,

vs.

SECRETARY OF H.E.W., DONALD S. BUZARD, President of Planned Parenthood Association of Milwaukee, PLANNED PARENTHOOD ASSOCIATION OF MILWAUKEE and PLANNED PARENTHOOD-WORLD POPULATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

JACKSON M. BRUCE, Jr.
780 North Water Street
Milwaukee, Wisconsin 53202

Attorney for Respondents,
PLANNED PARENTHOOD ASSOCIATION OF MILWAUKEE and PLANNED PARENTHOOD-WORLD POPULATION

Of Counsel:
MICHAEL J. SPECTOR and
QUARLES & BRADY
780 North Water Street
Milwaukee, Wisconsin 53202

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-1774

CIVIC AWARENESS OF AMERICA, LTD., a non-profit Wisconsin corp., ROSE EMMONS and JOANNE KUFFEL,

Petitioners,

vs.

SECRETARY OF H.E.W., DONALD S. BUZARD, President of Planned Parenthood Association of Milwaukee, PLANNED PARENTHOOD ASSOCIATION OF MILWAUKEE and PLANNED PARENTHOOD-WORLD POPULATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions below are adequately set forth in the petition and appendices.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

(1) Does cited federal family planning legislation tend to establish the religion of secular humanism in violation of the First Amendment?

(2) Does cited federal family planning legislation prohibit the free exercise of petitioners' religion in violation of the First Amendment?

(3) Do petitioners have standing, either as taxpayers or as "persons aggrieved by agency action" under the Administrative Procedure Act to challenge the lawfulness of expenditures under cited federal family planning legislation?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the statutory and constitutional provisions set forth in the petition, petitioner also argues that the Fifth Amendment to the United States Constitution is involved.

STATEMENT OF THE CASE

I. The petitioners claim that two federal family planning statutes which give freedom of choice in family planning matters to indigent persons contravene the religion clauses of the First Amendment to the Constitution. Their central premise is that the dispensing of family planning advice and materials (e.g. contraceptives) is a "religious" activity. In fact, the case is a transparent attempt by petitioners to use the religion clauses to invalidate government expenditures which

they oppose and thereby impose their religious beliefs upon all Americans. The District and Circuit Courts found petitioners' claims to be insubstantial, frivolous and wholly without merit and declined to convene a three-judge court.

The "religion" allegedly established by the challenged statutes, i.e., secular humanism, is not a recognized, organized or identifiable religion.* Equally important, petitioners do not allege any connection between defendants and the alleged religion. Even if the petitioners could surmount the threshold "religion" requirement, the logical conclusion of their argument is that government support of any activity consistent with the tenets of a particular religion violates the establishment clause. The courts below had little trouble finding such an argument to be a frivolous constitutional attack.

The courts below also found the free exercise claim of the petitioners to be insubstantial, frivolous and without merit. The petitioners have not alleged that the defendants restrained or coerced petitioners' practice of their religious beliefs.

II. Petitioners' statement of the case is inadequate in a number of particulars:

(1) The primary purpose of Planned Parenthood is not, as stated in the petition, to obtain federal funds, but

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* Secular humanism is mentioned in two Supreme Court footnotes; both cases involved classic free exercise claims of direct coercion against the freedom of belief of the plaintiff. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (oath for notary public to express belief in God) and *Welsh v. United States*, 398 U.S. 333, 357 (1970) (conscientious objector), citing *Torcaso, supra*.

rather, as alleged in the amended complaint, to provide family planning services to all persons including those of low income. One means of financing that purpose is through grants of the type in issue in this case.

(2) Petitioners have not alleged that any defendant is a religious organization or acting on behalf of a religious organization, or that the funds granted were used or to be used for any sectarian purpose.

(3) Section 508(a) of the Social Security Act, as amended, and the Family Planning Services and Population Research Act of 1970 expressly condition all grants on voluntariness. (Petition, Appendix pp. 2, 3, 7 and 9).

(4) No allegations in the record support the inclusion of abortion in plaintiffs' fifth and sixth Questions Presented and at pp. 4, 5 and 7 of petitioners' Statement of The Case, or of cloning in petitioners' title to their first reason for granting the petition, p. 8.

(5) There is no basis in the record, express or implied, for the allegation on p. 7 of the petition that grants under the family planning statutes "require plaintiffs to support a religion of human procreation and the use of federally supported genetics and selective population control all of which is contrary to their own and to the moral standards of the people of the United States for the greater part of its history."

ARGUMENT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS.

The decision of the Court of Appeals, adopting and confirming the two decisions of the District Court, plainly is not in conflict with the decision of another Court of Appeals on the same matter, nor does it in any way conflict with applicable decisions of the Supreme Court, and the petition makes no assertion to that effect.

II. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

A. Establishment.

The challenged statutes provide government support of plainly secular activities which have a plainly secular purpose. (See portion of House of Representatives' Report No. 91-1472, attached as Exhibit A.) Their principal and primary effect neither advances nor inhibits religion and there is no entanglement of the sovereign with religion. *Lemon v. Kurtzman,* 403 U.S. 602 (1971). They involve no "sponsorship, financial support and active involvement of the sovereign in religious activity." *Walz v. Commissioner,* 397 U.S. 664 (1970).

The decision below is *a fortiori* correct in the light of both earlier, *Bradfield v. Roberts,* 175 U.S. 291 (1899) and more recent Supreme Court cases, *Meek v. Pittinger,* 421 U.S. 349 (1975), *Roemer v. Board of Public Works of Maryland,* U.S. decided June 21, 1976, sustaining government support of *admittedly sectarian* institutions for activities having secular purposes. In the instant case, the threshold religion issue is not surmounted by petitioners because the grant recipient is not a sectarian institution. Stated in its most direct terms, petitioners' argument is that a grant

for a secular purpose to a secular institution advances a religion with which the grant recipient has no alleged connection because the purpose of the grant is not consistent with the tenets of petitioners' religion.

The petitioners' argument was met many years ago by Mr. Justice Frankfurter in his concurring opinion in *McGowan v. Maryland,* 366 U.S. 420, 465-466 (1961) in the following language:

> "The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any *purely* religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, *as religion,* an object of legislation.
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> * * *
>
> "With regulations which may have *other objectives* the Establishment Clause, and the fundamental separationist concept which it expresses, are not concerned. . . . *But once it is determined that a challenged statute is supportable as implementing other substantial interests than the promotion of belief, the guarantee prohibiting religious 'establishment' is satisfied."* (emphasis added).

The allegation that support of secular activities not consistent with the teachings of a particular religion itself constitutes a religion, is a fallacy long ago recognized by, among others, Professor Paul Freund:

> "Now we are ready to consider the alternative view of inseparability – that public school education is itself necessarily religious, but in a perverse sense, as so-called secularism is itself a form of religion, however degraded a form. If a state school worships the Anti-Christ, equal support is due to a school that

> worships Christ. But we must be careful not to construct a syllogism out of a metaphor of this kind, anymore than out of the countervailing metaphor, 'wall of separation.' To say Americans worship what Williams James called the bitch-goddess, Success, is not to assert anything relevant to the usage of 'religion' in the 1st Amendment. To say that the absence of Crucifixes or Torahs in a public school is itself a religious statement is either a play on words or an idiosyncratic characterization, like the Jehovah's Witnesses' view of the flag salute, which is not controlling as a definition of religion." 82 *Harv. L. Rev.* 1680, 1690 (1969).

B. Free Exercise.

Equally insubstantial is petitioners' contention that the cited federal family planning legislation violates the Free Exercise clause of the First Amendment. The argument that plaintiffs' Free Exercise rights have been violated because they are being "coerced" into supporting, through taxes, activities contrary to their religious beliefs has been flatly rejected by the Supreme Court, *Tilton v. Richardson,* 403 U.S. 672 (1971); *Board of Education v. Allen,* 392 U.S. 236 (1968).

Petitioners allege no coercion to themselves by reason of the federal planning grants. It has been long established that the Free Exercise clause does not preclude government support of an activity which is contrary to a religious tenet of a particular plaintiff unless that activity somehow directly coerces the plaintiff. *Braunfield v. Brown,* 366 U.S. 599 (1961). The named plaintiffs do not allege that they are being personally required to use family planning methods such as artificial contraception.

Petitioners' allegation of *de facto* coercion of the poor is rebutted on its face by the express insistence on voluntariness

in the grant legislation. *Engel v. Vitale,* 370 U.S. 421 (1962) is not analogous. Nothing in the challenged legislation or any other governmental act requires mandatory attendance at a Planned Parenthood clinic. Furthermore, plaintiffs do not allege that "the poor" are part of their class.

C. Innovative Pattern of Sexual Behavior.

Petitioners argue that the challenged legislation promotes "a specific, innovative pattern of sexual behavior" in violation of Supreme Court cases such as *Griswold v. Connecticut,* 381 U.S. 479 (1965) and *Roe v. Wade,* 410 U.S. 113 (1973). No rational reading of the statutes involved can equate the grants to provide voluntary family planning information and advice with promotion of a pattern of sexual *behavior* or sexual *conduct;* the assertion is wholly frivolous.

Moreover, *Griswold* and *Roe* stand for the proposition that the government cannot *prohibit* activity falling within the fundamental constitutional guarantees of individual privacy. Nothing in this voluntary legislation prohibits any particular sexual conduct or otherwise interferes with the individual's freedom of choice as did the statutes condemned in *Griswold* and *Roe.* Indeed, the primary purpose of the challenged legislation is to provide the indigent with that very freedom of choice in family planning decisions which *Griswold* previously guaranteed to non-indigent persons.

III. THE DECISION BELOW IS CLEARLY CORRECT.

A. Religion Clauses.

The decision of the Circuit Court of Appeals sustaining the constitutional validity of federal family planning legislation is in full accord with the decided cases of this court and that decision is obviously correct in the light of those decided cases, as above detailed.

B. Taxpayer Standing.

Petitioners also assign as error the decisions of the Circuit and District Courts with respect to their standing as taxpayers to raise questions of statutory application and interpretation. The lower court decisions follow necessarily from the decided cases of the U. S. Supreme Court. The petitioners have failed to show the direct injury necessary to establish taxpayer standing. *United States v. Richardson,* 418 U.S. 166 (1974); *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208 (1974).

Petitioners likewise do not come within the *Flast v. Cohen,* 392 U.S. 83 (1968) exception to the direct injury requirement because the challenged statutes do not "exceed specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." *Flast v. Cohen, supra,* 102, 103 (1968). In addition to their allegations of First Amendment violations, petitioners argue that the challenged legislation violates the Fifth Amendment because its purpose is to destroy life. The unborn are not, however, "persons" within the meaning of the Fifth Amendment, see *Roe v. Wade, supra* at 158 (14th Amendment) and the petitioners cannot represent a class of which they are not a part. *Bailey v. Patterson,* 369 U.S. 31, 32-33 (1962); see also, *Simon v. Eastern Kentucky Welfare Rights Organization,* U.S. decided June 1, 1976; *Warth v. Seldin,* 422 U.S. 490 (1975). Nor can plaintiffs rely for standing on the alleged threat to another person, *Tileston v. Ullman,* 318 U.S. 44 (1943).

Furthermore, petitioners have no "personal stake in the outcome of the controversy." *Baker v. Carr,* 369 U.S. 186, 204 (1962) and are no more than "concerned bystanders." They seek to do only that which was condemned by the Supreme Court in *Flast v. Cohen, supra,* and *Sierra Club v. Morton,* 405 U.S. 727 (1972):

"[Air] generalized grievances about the conduct of government. . . ." 392 U.S. at 106.

". . . do no more than vindicate their own value preferences through the judicial process." 405 U.S. at 740.

C. Administrative Procedure Act.

The lower court decisions correctly hold that petitioners fail to meet the prerequisites to APA standing: (a) "that the challenged action has caused an injury in fact, economic or otherwise," *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 152 (1970) and (b) that the alleged injury is to an interest "arguably within the zone of interests to be protected or regulated" by that action.

The petitioners claim the challenged legislation is causing an injury in fact to unborns. They have no standing to represent unborns, however, because they "cannot represent a class of which they are not a part," *Bailey v. Patterson, supra;* see also *Simon v. Eastern Kentucky Welfare Rights Organization, supra; Warth v. Seldin, supra; Watkins v. Chicago Housing Authority,* 406 F.2d 1234, 1236 (7th Cir. 1969).

It is equally clear that interests which the plaintiffs seek to protect are not within the "zone of interests" protected by the family planning legislation. (See portion of House of Representatives' Report No. 91-1472 attached as Exhibit A.) The family planning legislation gives freedom of choice in family planning matters to medically indigent persons. The plaintiffs, on the other hand, do not want to receive the family planning services supported by the grant nor have others receive them. They seek through this lawsuit to perpetuate anti-family planning value judgments stemming from their religious commitment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

JACKSON M. BRUCE, Jr.
780 North Water Street
Milwaukee, Wisconsin 53202

Attorney for Respondents,
PLANNED PARENTHOOD ASSOCIATION OF MILWAUKEE and PLANNED PARENTHOOD-WORLD POPULATION

Of Counsel:
MICHAEL J. SPECTOR and
QUARLES & BRADY
780 North Water Street
Milwaukee, Wisconsin 53202

JUN 3 0 1976

Exhibit A

"Need for Services" Portion of House of Representatives' Report No. 91-1472, 3 *U.S. Code and Congressional News* 5068, 5070-71 (1970).

"Need for services

Available evidence indicates that most couples in the United States want about three children, but that low-income families have more. The problems of excess fertility for the poor result to a large extent from the inaccessibility of family planning information and services. Although family planning is not a panacea for poverty, about one-half of the poor children in our Nation are in families with five or more children.

Medically indigent persons who are usually dependent on public and voluntary agencies for health care may have to do without these services unless they reside in an area where subsidized family planning services are readily available through the public health departments or voluntary agencies.

High fertility, high infant and maternal mortality, and high rates of prematurity are closely related. Both infant mortality rates and mental retardation rates are substantially higher than average among fourth and subsequent live births. These infants account for only 29 percent of all live births but approximately 45 percent of all yearly infant deaths and a larger proportion of infants born mentally retarded.

High infant mortality is also an indication of a high incidence of illness and physical deficiencies in infants. Prematurity, a factor in high infant mortality, is closely related to mental retardation and brain damage.

Although the problems of excessive childbearing in this country are not limited to low-income families, the consequences of unwanted births are most evident among poor families.

The mortality rate of infants born to low-income mothers is nearly double that of infants born to other groups of mothers. A recent study in the city of New Orleans showed that although only 26 percent of the women of reproductive age were poor, they accounted for 72 percent of the stillbirths, 80 percent of the maternal deaths, and 68 percent of the infant deaths. The problem of excessive fertility among the poor lies not so much in its affect on the national birth rate as in the accumulation of difficulties it imposes on the poor themselves. Unwanted pregnancies often wreck any chances for a better life for either parents or children. The unwanted child is a tragedy to himself, to his family, and very often to society.

A recent study indicated that 1,800 out of approximately 3,000 counties in the United States offered no family planning services whatsoever. In over 80 percent of the 1,200 counties which provided services, less than 100 patients per year were served. Ninety percent of approximately 4,000 non-profit general care hospitals in the United States in which most low-income mothers deliver babies offer no family planning programs at all.

Testimony received by the committee indicates that of the estimated 201,162 women in Georgia who are economically eligible for subsidized programs of family planning services, only 16 percent had access to those services.

It was also shown that in San Mateo County, Calif., one of the most affluent counties in the United States, less than one-third of approximately

5,500 medically indigent women who would use family planning services presently find them available.

Of the estimated 5 million medically indigent women who could probably use subsidized family planning services, if available, only one out of four now receive them.

These data indicate a substantial need for subsidized family planning services."

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 75-1774

In the Supreme Court of the United States

OCTOBER TERM, 1976

CIVIC AWARENESS OF AMERICA, LTD., ET AL., PETITIONERS

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1774

CIVIC AWARENESS OF AMERICA, LTD., ET AL., PETITIONERS

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioners, Civic Awareness of America, Ltd.,[1] and two individuals, brought this action for declaratory and injunctive relief in the United States District Court for the Eastern District of Wisconsin. They asserted that statutes authorizing federal expenditures for family planning services violate the Free Exercise and Establishment Clauses of the First Amendment and alleged that respondent Planned Parenthood Association of Milwaukee, a recipient of federal family planning grants, improperly engaged in abortion counseling.

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[1]Civic Awareness of America, Ltd., is a nonprofit Wisconsin corporation "associated for the purpose of upholding the principles of

The district court denied petitioners' motion to convene a three-judge court because it found the constitutional claims to be frivolous and insubstantial (Pet. App. 22-27; 343 F. Supp. 1358). The district court subsequently held that petitioners lacked standing to contest the activities of Planned Parenthood; the court therefore dismissed the action (Pet. App. 14-21; 387 F. Supp. 1086). The court of appeals affirmed (Pet. App. 10-12).

1. Petitioners' principal contention is that federal expenditures for family planning services violate the Free Exercise and Establishment Clauses of the First Amendment. The courts below correctly held that this claim is frivolous.

The statutes authorizing funding of family planning activities require that the receipt of family planning services funded by the federal government be strictly voluntary. See Section 1007, Public Health Service Act, as added, 84 Stat. 1508, 42 U.S.C. 300a-5, and Section 508, Social Security Act, as added, 81 Stat. 926, 42 U.S.C. 708. The district court correctly noted (Pet. App. 27):

> Both statutes are careful to insist on voluntary participation. Thus, there is no threat that plaintiffs will be compelled to learn about or exercise birth control.

Accordingly, petitioners' contention that the federal statutes infringe their right to free exercise of religion is insubstantial.[2] Similarly insubstantial is petitioners'

Judeo-Christian civilization and opposing artificial contraception, cloning, vasectomy, abortion and similar activities * * *" (Pet. 5).

[2]Moreover, while this Court has noted that the state may not "affirmatively oppos[e] or [show] hostility to religion, thus 'preferring those who believe in no religion over those who do believe'" (*School District of Abington Township* v. *Schempp*,

contention that the use of their tax dollars to support an activity that conflicts with their religious beliefs prohibits their free exercise of religion. *Tilton* v. *Richardson*, 403 U.S. 672, 689.

Nor does federal spending for family planning establish a religion by supporting an activity of which some persons may approve because it comports with their religious beliefs:

> [T]he "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy.

McGowan v. *Maryland*, 366 U.S. 420, 442 (upholding Sunday closing laws). In short, government subsidization of an activity does not amount to an establishment of religion merely because some religions may believe that activity to have religious significance.

2. Petitioners also contend that a federal family planning grant to Planned Parenthood was used for abortion

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374 U.S. 203, 225), the funding of family planning activities cannot be said to be hostile to religion because family planning is not offensive to most religions. In this respect, family planning is similar to the teaching of evolution in the public schools—although it may be offensive to some religions, it is not hostile to religion in general. See *Epperson* v. *Arkansas*, 393 U.S. 97,

counseling, in violation of Section 1008, Public Health Service Act, as added, 84 Stat. 1508, 42 U.S.C. 300a-6, which prohibits the use of such funds "in programs where abortion is a method of family planning." Petitioners asked that the Secretary of Health, Education, and Welfare be enjoined from making further grants to Planned Parenthood. The courts below did not reach the merits of petitioners' claim but instead correctly held that petitioners lacked standing to raise this issue, either as taxpayers or as parties "aggrieved by agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. 702.

In *Flast* v. *Cohen*, 392 U.S. 83, 102, this Court determined that the relevant inquiry for determining whether a taxpayer has standing to sue in that capacity is "whether there is a logical nexus between the status [of taxpayer] and the claim sought to be adjudicated." In particular, the Court held that a taxpaper has standing to raise a claim that a statute "exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power * * *" (392 U.S. at 102-103).[3] In this case, there is no such claim which gives petitioners standing as taxpayers. Since petitioners' constitutional claim had previously been dismissed as insubstantial, petitioners were left with their claim that Planned Parenthood's activities are unlawful under the statute. This claim plainly does not fall within the rule in *Flast*.

In order otherwise to establish standing, a plaintiff must demonstrate "that the challenged action has caused him injury in fact, economic or otherwise."

[3]Beyond this limited situation, a taxpayer *qua* taxpayer may not invoke the judicial power to challenge the validity of a statute because in that status he has not sustained and is not likely to sustain any "direct injury" as a result of the statute's enforcement. See *Frothingham* v. *Mellon*, 262 U.S. 447, 488.

Association of Data Processing Service Organizations, Inc. v. *Camp*, 397 U.S. 150, 152. Petitioners have not and cannot demonstrate "injury in fact." Their main claim is that unborn children will suffer injury. But petitioners "cannot represent a class of [which] they are not a part" (*Bailey* v. *Patterson*, 369 U.S. 31, 32-33; *Hall* v. *Beals*, 396 U.S. 45, 49) or on whose behalf they cannot properly speak. Thus, even if unborns have rights that warrant protection (see *Roe* v. *Wade*, 410 U.S. 113), the named plaintiffs lack standing to assert such rights. *Tileston* v. *Ullman*, 318 U.S. 44; *Warth* v. *Seldin*, 422 U.S. 490.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.